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No. 92-1725

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LEONARD L. GUMPORT, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES,

v.

INTERSTATE COMMERCE COMMISSION

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIÆ IN OPPOSITION

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QUESTION PRESENTED

Whether the trustee of a bankrupt interstate motor carrier has standing to claim that he has no obligation to adhere to the carrier's filed tariffs that allegedly do not comply with the provisions of the Interstate Commerce Act.

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BRIEF FOR AMICUS CURIÆ IN OPPOSITION

The National Industrial Transportation League, as *amicus curiae,* respectfully urges this Court to deny the cross-petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. The court of appeals correctly determined that a trustee of a bankrupt motor carrier of property subject to the Interstate Commerce Act lacks standing to pursue a claim that he is not bound by the carrier's tariffs on file with the Interstate Commerce Commission on the grounds that the filed tariffs did not disclose information assertedly necessary to satisfy the general tariff provisions of 49 U.S.C. §10762.

REASONS FOR DENYING THE WRIT

The questions presented by the cross-petitioner, Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines ("Gumport"), do not warrant review by this Court. First, there are no court opinions contrary to the Ninth Circuit's ruling that Gumport, in his capacity as a representative of Transcon Lines ("Transcon"), lacked standing to attack the lawfulness of Transcon's tariff rate structure. Second, Gumport's argument here, that he was attacking the "legality," in addition to the "lawfulness," of Transcon's tariff discounts, is both *post-hoc* sophistry and immaterial. It merely presents an issue that already has been clearly resolved by the jurisprudence of this Court.

ARGUMENT

Gumport appears effectively to have conceded that the decision below correctly held that, as the representative of the estate of Transcon Lines, he lacked standing to challenge the lawfulness of the carrier's tariffs. He contends here that his suit was misunderstood by the circuit court in that he challenged both the "lawfulness" and the "legality" of the carrier's account code tariff rates. In his cross-petition Gumport asserts:

> This, then, is the crux of the case. If, as the Trustee contends, his challenge was to the *legality* of the rates, as well as to

> their lawfulness, the court of appeals' standing decision was improper. . . .

Cross-Petition at 9 (emphasis in original).

The Ninth Circuit in fact was astutely aware of the distinction between a "legal" and a "lawful" rate. On the one hand, ". . . an attack on the 'legality' of a rate means an allegation that the rate is not a *filed* rate." ICC App. at 22a (emphasis in original).* "But a rate is not immune from challenge simply because it is filed; that rate must also comport with the other provisions of the Act. Any challenge to a filed rate is a challenge to its 'lawfulness'." *Id*

These propositions are long and well established principles of federal transportation law. This Court's opinion in *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 384-85 (1932) is often cited as authority for the distinction between "legal" and "lawful" rates. As the court below correctly ruled, the rate contained in a carrier's tariff on file at the ICC is its "legal" rate, *i.e.*, the rate which by statute is the legally applicable rate. 49 U.S.C. §§ 10761(a) and 10762(a). However, a legally applicable rate is not necessarily lawful. The rate may be legal because it has been filed in a tariff with the Commission, but it

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* Citation's are to the appendix to the Petition of the Interstate Commerce Commission for Certiorari in No. 92-1547, seeking review of another issue in the Ninth Circuit's decision.

also may violate substantive provisions of the Interstate Commerce Act and, therefore, be unlawful.

Gumport has repeatedly criticized Transcon's discount tariff structure, asserting that it was discriminatory because it contained shipper specific rates and identified each shipper by an account code number that was not made available to the public. Cross-petition at 6-19. Since Gumport concedes that "the Trustee's challenge to the discount rates as *per se* discriminatory was a challenge to the rates' unlawfulness," *Id.* at 14, his attempt now to dress what is "admittedly" a question of lawfulness in a cloak of "illegality" is transparent and unpersuasive. *Id.*

However, even if, as Gumport contends, his attack upon Transcon's discount tariffs included a question as to their "legality," then he would have been required to demonstrate that those tariff discounts were not accepted by the ICC and were not placed on the Commission's public tariff file. "Where tariffs are tendered to and accepted by the Commission, the rates therein become applicable, even though technically they should have been rejected upon tender." *ICC v. American Trucking Associations, Inc.*, 467 U. S. 354, 363, n 7 (quoting *Acme Peat Products, Ltd. v. Akron, C. & Y. R. Co.*, 277 ICC 641, 644 (1950)). A carrier cannot disavow unilaterally the terms of its filed tariff rates on the grounds that the rates are in violation of the Interstate Commerce Act. *Magnolia Provision Co. v. Beaumont, S. L. & W. Ry.*, 20 F.2d 834 (S. D.

Tex. 1927), *aff'd*, 26 F.2d 72 (5th Cir.), *cert. denied*, 278 U.S. 620 (1928). As one court recently explained:

> The Supreme Court long ago rejected the view that a tariff on file with the Commission and never rejected by it should be disregarded or treated as non-existent merely because of some element of substantive unlawfulness in the rate, *Davis v. Portland Seed Co.*, 264 U. S. 403, 44 S. Ct. 380, 68 L. Ed. 762 (1924), or some irregularity in the tariff filing formalities, *Berwind - White Coal Mining Co. v. Chicago & Erie Railroad Co.*, 235 U. S. 371, 35 S. Ct. 131, 59 L. Ed. 275 (1914).

Genstar Chemical Ltd. v. Interstate Commerce Commission, 665 F 2d. 1304, 1308 (D. C. Cir. 1981), *cert. denied,* 456 U. S. 905 (1983).

The material facts of record in this case are not contested. Transcon formally filed with the Commission, and the Commission accepted, tariff publications containing the rates which Gumport now seeks to avoid. By his own admission, at least "[n]inety percent of all discounts given by Transcon *were listed in a separate tariff filed with the Commission* labeled 'TCON 625.'" Cross-petition at 4 (emphasis added); see also ICC App. at 5a (same). Thus, Gumport's reliance on the Ninth Circuit's comment that *Maislin Industries, U. S., Inc. v. Primary Steel, Inc.* 497 U. S. 116 (1990)

recognized a carrier's standing to challenge the "legality" of its own rates is fundamentally misplaced. *Maislin* disallowed the enforceability of *unfiled* rates. Clearly that is *not* the issue here.

Stripped to its essence, Gumport's argument simply is that this Court should sharply extend *Maislin* and overrule other Supreme Court precedent. *Maislin* held that the Commission could not supplant a tariff rate with a non-tariff rate solely upon the basis that the shipper and carrier had agreed to do business at the non-tariff rate. Gumport would ask that this Court now rule that courts can reject tariffs filed with and maintained for public inspection at the Commission, years after they were filed, on the grounds that technical statutory or regulatory requirements arguably were not fully met. The Court on a number of occasions already has rejected this approach and there is no reason to take up Gumport's current request for further review of a settled question of law.

It is clear that well-established principles of federal transportation law prevent Gumport from asserting claims that Transcon's own discount tariffs were not permitted by the Interstate Commerce Act. Under equally well-settled principles of the law of standing, the court of appeals correctly held that Gumport could not pursue such claims against shippers. *Lujan v. Defenders of Wildlife,* ---- U. S. ---,---, 60 U.S.L.W. 4495, 4497 (1992) and *Allen v. Wright,* 468 U.S. 737, 751 (1984).

CONCLUSION

The cross-petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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